

NO. 21780

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LLOYD THOMAS and
KENNETH WHITE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

Appellants Lloyd Thomas, Kenneth White and co-defendants Antonio Salido-Yescas and David Rendon-Navia were indicted on March 9, 1966 for violations of Title 21, United States Code, §176(a). Judgments of conviction were entered on June 29, 1966. Notices of appeal were filed on June 29, 1966.

Jurisdiction of the District Court was predicated on Title 18, United States Code, Section 3231. Jurisdiction of this Court is based upon Sections 1291 and 1294 of Title 28, United States Code.

II

STATEMENT OF THE CASE

The two-count indictment, filed March 9, 1966, charged the appellants essentially as follows [C. T. 2-6]: 1/

Count One: Beginning on or about February 17, 1966 and continuing to the date of the indictment, defendants Lloyd Thomas, Kenneth White, Antonio Salido-Yescas, and David Rendon-Navia did agree, confederate, and conspire together to fraudulently and knowingly import and bring into the United States of America, marihuana contrary to law.

Count two: On or about February 18, 1966, defendants Antonio Salido-Yescas, David Rendon-Navia, Lloyd Thomas and Kenneth White, with intent to defraud the United States, knowingly received, concealed, and facilitated the transportation of 522 kilograms of marihuana, which had been imported contrary to law.

Appellants were arraigned on March 26, 1966; both entered not guilty pleas [R. T. 7-10, 19-20]. 2/ Trial by jury commenced on May 2, 1966 before the Hon. Francis C. Whelan, United States District Judge [R. T. 29]. Verdicts of guilty on both counts as to each appellant were returned on May 9, 1966 [C. T. 52-53]. Appellants' Motion for a New Trial was denied on June 29, 1966 [C. T. 54]. Judgments of conviction were entered on June 29,

1/ "C. T. " refers to Clerk's Transcript.

2/ "R. T. " refers to Reporter's Transcript.

1966 [C. T. 54], and on that date, appellants' notices of appeal were filed [C. T. 75-77].

III

STATUTE INVOLVED

The Indictment charges a violation of Section 176(a) of Title 21, United States Code, which provides in pertinent part:

" . . . Whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals . . . or in any manner facilitates the transportation, concealment . . . of such marihuana after being imported or brought in knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000. . . .

"Whenever on trial for a violation of this section, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession

to the satisfaction of the jury"

IV

STATEMENT OF FACTS

On February 17, 1966, pursuant to information previously received, a look-out was posted at the port of entry, San Luis, Arizona [R. T. 55, 82]. At approximately 4:55 p. m. (MST) on that date two Mexicans, Antonio Salido-Yescas and David Rendon-Navia, entered the United States from San Luis, Sonora, Mexico in a 1953 International, 2-1/2 ton truck [R. T. 56, 57]. The truck was followed by Customs Agents [R. T. 62-64] until it was parked at Garvey and Meeker Streets in El Monte, California [R. T. 65-66]. The occupants, Yescas and Navia, registered into Room #4 of the El Campo Motel [R. T. 100-101], located across the street from where the truck was parked [R. T. 66].

At approximately 11:30 p. m., Navia and Yescas left the motel and walked directly to a vehicle situated at the rear of a service station a few blocks away [R. T. 121-123]. There, they met and conversed with the two male occupants of a Ford station wagon parked on the premises [R. T. 123-126]. Soon thereafter, one of these two men appeared to receive a telephone call at a nearby booth [R. T. 126-127]. About 15 minutes later, all four men entered the Ford and left the vicinity [R. T. 129].

At approximately 1:20 a. m., a 1958 Buick, driven by appellant White [R. T. 369, 457] with appellant Thomas as his

passenger [R. T. 457], proceeded along Garvey Boulevard, made an abrupt right turn, drove directly to a spot behind the truck and parked [R. T. 139].

Thomas, the passenger, left the vehicle [R. T. 146, 472] and entered the motel [R. T. 146-147]. Minutes later, Thomas returned, crossed the street, went directly to the truck, and drove it away [R. T. 148, 471-472]. Thomas, driving the truck, was alternately led and followed by White, driving the Buick [R. T. 147, 151-152, 194], until the vehicles reached Pasadena [R. T. 203]. Both vehicles were followed by five or six government vehicles as they proceeded through residential areas, during which time there was almost no other traffic on the road [R. T. 205]. The truck and the Buick separated at Rosemead Avenue in Pasadena [R. T. 195].

After a time, Thomas parked the truck at the intersection of Lincoln and Oaks in Pasadena [R. T. 206]. Approximately 25 minutes later, White drove up, and saw the Customs agents who were watching the truck [R. T. 205, 461]. White then stopped the Buick, flashed the headlights from bright to dim, and drove away [R. T. 206]. Thomas immediately drove the truck away in the opposite direction [R. T. 206], and began meandering through the streets of Pasadena [R. T. 207-208]. Eventually, the truck was stopped and Thomas was arrested [R. T. 208]. In the truck was approximately 1,050 pounds of marihuana [R. T. 357-358] and the keys to the ignition [R. T. 473].

Navia and Yescas were then arrested at the motel [R. T. 340, 483]. Later that morning, the manager of the motel found

\$11,200.00 in a paper sack under the bed in the room occupied by Yescas and Navia [R. T. 105]. Neither Yescas or Navia had the key to the truck in his possession at the time of his arrest [R. T. 340].

The Buick and the Ford were found abandoned on the street some time later [R. T. 374, 463-464]. In the Ford was clothing worn by one of the men who had met with Yescas and Navia at the service station [R. T. 127, 374], and a card bearing Navia's name [R. T. 374-376].

V

QUESTIONS PRESENTED

- I Was it prejudicial error to deny appellants' motion for a mistrial?
- II Is the evidence sufficient to support the verdict?

VI

ARGUMENT

- A. APPELLANTS WERE NOT PREJUDICED
 BY THE DENIAL OF THEIR MOTION
 FOR A MISTRIAL.
-

Appellants cite no case and research discloses none in which reversible error was committed by a trial court in failing to declare a mistrial following the prosecutor's reference to admissions and inconsistent exculpatory statements in the opening

statement. It is fundamental that the government is entitled to inform the jury in its opening statement of what it expects to prove.

The prosecutor's reference to information provided to Customs agents by an informant added nothing to the case. With defense counsel's acquiescence [R. T. 77], an agent was permitted to testify to the evidence adverted to in the opening statement, namely, that pursuant to information received, a look-out for the particular truck involved was posted [R. T. 82]. Moreover, the trial court promptly admonished the jury to disregard the remarks in the prosecutor's opening statement [R. T. 53].

Assuming arguendo that the prosecutor's opening statement contained improper remarks, the admonishment given by the court was sufficient to protect the defendant.

See: United States v. Peasecki, 300 F.2d 152

(3rd Cir. 1962);

United States v. Courtney, 257 F.2d 944

(2nd Cir. 1958);

United States v. Moran, 194 F.2d 623

(2nd Cir. 1952), cert. denied, 343 U.S. 965
(1952);

United States v. Roberts, 223 F. Supp. 49

(E. D. Ark. 1963), aff'd., 332 F.2d 892

(8th Cir. 1964), cert. denied, 380 U.S. 980
(1965).

Dennis v. United States, 302 F.2d 5 (10th Cir. 1962) relied upon by appellant is inapposite. The case is entirely distinguishable

on its facts since "devastating" hearsay evidence was emphasized in both opening and closing remarks and admitted into evidence over appellants' objection.

B. THE EVIDENCE IS SUFFICIENT TO
SUPPORT THE VERDICT.

This Court will view the evidence, and all reasonable inferences to be drawn therefrom, in the light most favorable to the government.

Glasser v. United States, 315 U.S. 60 (1942);

Moody v. United States, 376 F.2d 525 (9th Cir. 1967).

The applicable test regarding sufficiency of the evidence is whether reasonable minds could find that the evidence excludes every hypothesis but that of guilt.

Miller v. United States, 383 F.2d 583

(9th Cir. 1967);

Lee v. United States, 376 F.2d 98 (9th Cir. 1967).

Viewing the evidence in the light most favorable to the government, this test is met by the following facts and inferences:

- (1) The marihuana was smuggled into the United States in the truck driven by Yescas and Navia [R. T. 55, 82];
- (2) According to plan, Yescas and Navia went directly to a motel where one of them had previously stayed [R. T. 65-66, 100-103];

- (3) Yescas and Navia left the motel at 11:30 p. m. and followed an obviously planned route to a pre-arranged meeting with two men, where a telephone call was received (obviously, to inform the buyer of the arrival of the load) [R. T. 121-129];
- (4) About an hour later, a Buick owned by appellant Thomas and driven by appellant White, came toward the motel, turned abruptly, and drove directly to the truck, stopping immediately behind it (indicating that White knew exactly where the vehicle was parked) [R. T. 139, 369, 457];
- (5) Appellant Thomas exited the vehicle, entered the motel, stayed there for 5 minutes, returned directly to the truck, and drove it away [R. T. 146-148, 471-472];
- (6) \$11,200.00 was subsequently found in Yescas and Navia's motel room [R. T. 105]. Neither of these two men had the keys to the truck when arrested [R. T. 340]. (Inferentially, Thomas received the keys from Yescas and Navia in exchange for the money while Thomas was in the motel.)
- (7) Thomas in the truck was controlled and directed by White in the Buick until both vehicles arrived in Pasadena. Several stops (to ascertain whether they were followed) were made along the way. The truck parked and waited until White's (the

Buick's) signal, after he spotted the Customs agents, directed Thomas (the truck) to leave the area in an attempt to avoid the surveilling agents [R. T. 147-148, 151-152, 194-195, 203-208, 461, 471-472].

(8) White immediately abandoned the Buick [R. T. 463-464].

(9) White's testimony, which is analyzed infra, was inherently incredible; the jury obviously chose to disbelieve his "innocent" explanation.

Appellants rely on Evans v. United States, 257 F.2d 121 (9th Cir. 1958); Glover v. United States, 306 F.2d 594 (10th Cir. 1962) and Tripp v. United States, 295 F.2d 418 (10th Cir. 1961). Each case is factually distinguishable. Evans turned on the failure of the government to prove defendant's connection with the specific heroin involved in the indictment. Glover was reversed because there was no independent evidence of a conspiracy other than defendant's presence "in the vicinity" where an informant bought narcotics from a co-defendant and a general conversation about future narcotics dealing. In Tripp the only evidence against defendants was their apparently innocent association with co-defendants who passed counterfeit bills. Here, however, appellants took possession and control of the smuggled marihuana under circumstances which manifestly reflected an elaborate, pre-arranged plan.

On fewer facts, the jury's determination that a defendant was

a conspirator has been upheld on appeal.

Castro v. United States, 323 F.2d 694

(9th Cir. 1963).

Appellant also relies on Miller v. United States, 383 F.2d 583 (9th Cir. 1967). There, the evidence against defendant Miller was hardly greater than that against appellants herein; the evidence against Mrs. Joseph was much less than that disclosed by the record before this Court. In Miller, the evidence against Mrs. Joseph was essentially that she owned the "target" vehicle, driven by Miller, and that she had been seen with Miller at a known narcotic dealer's house in Nogales. There was no activity similar to the acts by Thomas and White outlined above.

Appellants' references to cases involving proof of possession likewise are not pertinent. Substantial evidence was before the jury that the marihuana was in fact illegally imported, and that appellants, as co-conspirators, had knowledge of that illegal importation.

On these facts, therefore, the presumptions contained in Section 176(a), arising from possession, are unnecessary. Circumstantial evidence is sufficient to establish the illegal importation, and knowledge of that fact, even if a defendant never has physical possession of the marihuana.

See: Miller v. United States, supra;

Hill v. United States, 379 F.2d 811, 814

(9th Cir. 1967);

Castro v. United States, supra;

In fact, however, the evidence establishes that Thomas had physical control of the "load" truck, containing the marihuana, and he, the truck, and the marihuana were dominated and controlled by White, driving the "chase" car. Appellant White, of course, admitted the joint decision to take control of the truck and its contents [R. T. 474, 476], and the record reflects clearly that Thomas in the truck responded to White's direction and control. Thus, a finding of joint or constructive possession in Thomas and White as to Count 2 is fully supported by the evidence, even assuming the applicability of the Section 176(a) presumption.

The single question raised by White's testimony, which the jury apparently disbelieved, is whether Thomas and White knew of the marihuana in the truck and that it was imported illegally; that is, were White and Thomas members of the scheme, or only unlucky car thieves? Put another way, does White's story present a valid, reasonable alternative inference from the facts adduced at trial?

The activities outlined above do not reflect a series of "innocent" (theft of a truck) acts. Reasonable minds could reject the truck-stealing hypothesis as a patently contrived and tailored explanation of the strange manner in which the truck was picked up by White and Thomas.

It is submitted that, as distinguished from the Miller case, supra, White's testimony failed to raise a valid, alternative inference, because of its inherent incredibility. White's story was

essentially that:

- (1) He left his brother's restaurant in Pasadena unattended "to go for a ride" with Thomas at between 11:00 p.m. and 12:30 a.m. [R. T. 458, 469].
- (2) White was driving Thomas' car in the El Monte area [R. T. 470].
- (3) White passed the "load" truck, parked on a dark side street, and mentioned "there's a truck with a foreign license" [R. T. 470], so Thomas and White decided to steal it [R. T. 470].
- (4) White turned around, made a left-turn, and parked behind the truck [R. T. 471].
- (5) Thomas got out, crossed the street, returned, looked into the cab, told White the keys were in it, and got into the truck [R. T. 472]. White, however, didn't notice the motel, or where Thomas went when he crossed the street [R. T. 473].
- (6) Appellants already had decided that White would direct Thomas (in the truck) to the general area of Pasadena [R. T. 474, 476]. No decision was ever made as to what they were to do with the truck [R. T. 474], or where in Pasadena they would store it [R. T. 476].
- (7) Both vehicles stopped momentarily in a shopping center while White gave directions to Thomas

[R. T. 477]; they stopped again on Rosemead Avenue [R. T. 477] for White to give further instructions.

(8) White then drove back to the cafe after telling Thomas he would see him later -- no arrangements were made for a meeting with Thomas in the truck [R. T. 477].

(9) At Figueroa and Lincoln, as White was returning home, he accidentally saw Thomas sitting in the parked truck, so White stopped [R. T. 478]. White said nothing to Thomas and couldn't remember whether he flicked his lights from dim to bright [R. T. 478].

(10) At this time, also, White saw two men seated in a vehicle in an empty parking lot, concluded that they were police officers, and shortly thereafter, he abandoned the Buick [R. T. 478-479].

Contradicting White is the testimony of the surveilling agents who saw the Buick abruptly turn right onto Meeker from Garvey and park directly behind the truck [R. T. 139]. Thomas (the passenger) left the Buick, entered the motel, stayed 5 minutes, came out of the motel and immediately entered the truck [R. T. 147]. The Buick waited a few minutes and followed the truck [R. T. 147]. Both vehicles stopped on the street at Valley Boulevard and Peck Street, where the Buick remained behind the truck for 4 to 6 minutes [R. T. 180-181], during which time neither driver got out of his vehicle or

got into a position to converse with the other [R. T. 151].

The jury chose to believe the surveilling agents. Moreover, reasonable men could choose to believe that White's testimony, aside from the conflicts with the testimony of the government agents, was unbelievable; that it did not present a valid, reasonable, alternative inference. White is not entitled to have the jury accept his incredible story, which asks them to believe that:

These two men, joy-riding in the middle of the night, happened to stumble upon this particular truck [R. T. 470]. The truck was parked on a dark side street in a residential district miles from appellants' homes, with the keys in the ignition and 1,000 lbs. of marihuana in the bed [R. T. 470-473, 357-358]. Thomas, who owned the Buick driven unexplainedly by White, got out to steal this ten year old truck [R. T. 470]. Thomas just happened to walk across the street in the direction of this particular motel in which two smugglers were staying [R. T. 146-148, 471-472]. Thomas then returned, noticed the keys in the vehicle, jumped in the truck, and drove away [R. T. 146-148, 471-472]. Thomas didn't know the way to Pasadena so he drove a few blocks, then pulled into a shopping center to wait for White to help him [R. T. 477]. Thomas then followed White onto the freeway and off again before they decided to go their separate ways [R. T. 477]. Although it was nearly 3:00 a. m., White casually returned to the cafe without making further arrangements about meeting Thomas to dispose of, or store, the stolen truck [R. T. 477]. Thirty minutes later, White accidentally drove by Thomas, who was parked, for no apparent

reason, at Lincoln and Figueroa [R. T. 478]. White stopped and said nothing, and then drove away [R. T. 478]. Coincidentally, Thomas immediately drove off in the other direction. White had seen what he thought were police officers. Soon, he became genuinely concerned, so he abandoned the Buick on the street in Pasadena [R. T. 478-479].

It is submitted that White's testimony is sufficiently unbelievable that the jury could infer White's guilt therefrom. Castro v. United States, supra; Debardeleben v. United States, supra. In any event, it fails to present a valid, reasonable hypothesis.

VII

CONCLUSION

For the foregoing reasons, the judgment of conviction should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Craig B. Jorgensen
CRAIG B. JORGENSEN

